S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 2013
v	No. 304935 Genesee Circuit Court
FERONDA MONTRE SMITH, Defendant-Appellant.	LC No. 08-23581-FC

Before: GLEICHER, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and first-degree felony murder, MCL 750.316(b). The jury acquitted him of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.227f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to the mandatory term of life imprisonment for murder and to 250 months' to 35 years' imprisonment for armed robbery. Defendant appeals his convictions, and we affirm.

Defendant's convictions arise out of the murder of Larry Pass, Jr., a drug dealer, in Flint, Michigan, on November 4, 2005. Pass was shot multiple times in his home, apparently during a cocaine sale. Two witnesses, Mark Yancy and Terrance Lard, testified that they were present at the murder, and although neither actually saw defendant shoot, the prosecution's theory of the case was that defendant must have been the shooter because no one else was present in Pass's home at the time. Defendant's theory of the case was that he was not present and either Yancy or Lard shot Pass. Yancy and defendant had some kind of dispute with each other at the time of the murder. Lard testified in exchange for a plea deal, and Yancy received a substantial sum of money as an informant, although there was some conflict as to whether that compensation included information relevant to the instant case or only to other matters. No murder weapon was recovered, and defendant's fingerprints were not found at the scene of the crimes.

A warrant was issued for defendant's arrest, and defendant was arrested, in December of 2007. On December 17, he was arraigned on eleven charges, all arising out of the murders of Pass and Erwin Blue, as well as various criminal enterprises conducted between 2003 and 2007. Defendant never posted bond and remained incarcerated until his trial. During the arraignment, defendant first asked for a speedy trial. Defendant again asked for a speedy trial at a December 21, 2007, pretrial conference, during which the prosecution requested, and the trial court granted

over defendant's refusal to sign a waiver, an adjournment to add additional defendants and respond to defendant's discovery request. Defendant twice filed motions to dismiss for violation of his right to a speedy trial prior to his initially scheduled trial date of June 22, 2010, both of which the trial court denied. The day before trial, it was discovered that numerous transcripts contained serious errors, so the trial court adjourned the trial to have corrected transcripts provided. Shortly thereafter, defendant's trial counsel had to remove himself from the case due to a job transfer. Substitute counsel was appointed on July 1, 2010. Trial was adjourned four more times, three times at the request of defendant's substitute counsel. Trial commenced on May 10, 2011, approximately 41 months after defendant was arrested.

Defendant argues that his convictions should be vacated because he was deprived of his right to a speedy trial. We disagree.

A criminal defendant has a constitutional and statutory right to a speedy trial. U.S. Const., Ams. VI and XIV; Const. 1963, art. 1, § 20; MCL 768.1. See also MCR 6.004(A). *People v Cleveland Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). "Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law." *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158, 167 (1997). We review factual findings for clear error and constitutional questions de novo. *Id*. Dismissal with prejudice is the only remedy for a violation of the Sixth Amendment right to a speedy trial. *Barker v Wingo*, 407 US 514, 522; 92 S Ct 2182, 2188; 33 L Ed 2d 101 (1972). Under the "*Barker* test," a court must balance the length of the delay, the reason for the delay, the defendant's assertion of the right to a speedy trial, and any prejudice to the defendant in determining whether the right to a speedy trial has been violated. *People v Collins*, 388 Mich 680, 688; 202 NW2d 769 (1972); *Barker*, 407 US at 529. All of the factors must be balanced. *Barker*, 407 US at 533. However, unless the delay is long enough to be presumptively prejudicial, no such inquiry need be undertaken. *Williams*, 475 Mich at 262. A delay of at least 18 months from the date of the defendant's arrest triggers the presumption, after which the prosecution has the burden of showing that the defendant was not prejudiced. *Id*. There is no dispute here that the 41-month delay was long enough to trigger the presumption of prejudice. Furthermore, defendant's repeated assertion of his right to a speedy trial "is entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." *Barker*, 407 US 531-532.

"In assessing the reasons for delay, the court must examine whether each period of delay is attributable to the prosecutor or to the defendant." *People v Walker*, 276 Mich App 528, 541-542; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). The delay becomes more tolerable as the complexity of the case increases. *Collins*, 388 Mich at 689. Unexplained delays, scheduling delays, docket congestion, and other delays inherent to the court system are attributed to the prosecution, *Walker*, 276 Mich App at 542, are "given a neutral tint[,] and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Williams*, 475 Mich at 263. The prosecution's "deliberate attempt to delay the trial in order to hamper the defense," should be weighed more heavily against the prosecution. *Barker*, 407 US at 531. Delays resulting from the time necessary to adjudicate defense motions are attributed to the defendant. *Walker*, 276 Mich App at 542. Where defendant changes defense counsel, the time necessary for the new attorney to become familiar with the case is a valid delay. *People v Anderson*, 53 Mich 60, 60; 18 NW 561 (1884).

In denying defendant's first motion to dismiss on the basis of a denial of a speedy trial, made 25 months after his arrest, the trial court attributed 9 months to defendant, although it noted that of the remaining months attributed to the prosecution, six of them were due to the complex nature of the case and therefore of reduced weight. In denying defendant's second motion to dismiss, approximately a year later, the trial court concluded that the entire duration of the delay after his first attorney's withdrawal—approximately 10 months as of the date of the order—was attributable to defendant. It is not readily apparent to us if the remaining 6 months were ever assessed, but the parties do not appear to contest those months one way or the other. Defendant's argument pertaining to the reason for delay exclusively challenges the trial court's decision to attribute the delay arising from the substitution of counsel to the defense rather than the prosecution.

Defendant asserts that the parties were actually both ready and willing to go to trial when the erroneous transcripts were discovered. The trial court recognized defendant's argument that his attorney's withdrawal should not be counted against him, but deemed that "[c]ounsel should not be faulted for wanting to effectively represent Defendant, and the People should not be penalized either by dismissal of their case." Defendant argues that the trial court missed the point: his attorney's withdrawal was necessitated by the trial court's unilateral decision to delay proceedings despite neither party believing that doing so was necessary or desirable; consequently, the delay was proximately caused by the trial court, not counsel. Indeed, the trial court did state at the time that "[t]his snafu is not this young man's fault." We agree with defendant that the trial court's order does not address the gravamen of his argument. However, conversely, an excessive focus on "blame" is of little value here, because it is clear that the transcript situation was not the prosecution's fault, either. Courts depend on the accuracy of our records, and we are simply not willing to give much weight to a delay caused by the need to ensure their correctness. It appears to us that a great many of the delays in this case were not necessarily the "fault" of either side, and the critical question is only whether defendant was actually prejudiced.

The prosecution argues that defendant has failed to show any prejudice. This argument is misplaced under the circumstances. There is some historical precedent suggesting that whether the prosecution or the defendant has the burden of either showing or disproving prejudice depends on the amount of delay attributable to that party. *People v Holtzer*, 255 Mich App 478, 492; 660 NW2d 405 (2003). However, *Holtzer* relied on *Collins*, which held no such thing; furthermore, the delay in *Collins* was a mere 15 months, much of which was directly and personally the fault of the defendant. The correct rule is that the *total* amount of delay governs whether a defendant or the prosecution has the burden of proving or disproving prejudice. See *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009). The party responsible for the delay is only one factor to consider. Consequently, irrespective of whether defendant or the prosecution is more at "fault" for the 41-month delay here, the simple fact is that the delay *was* 41 months, and consequently the burden is on the prosecution to show that there was no prejudice.

However, as a factual question, our review of the trial court's findings is for clear error, and the prosecution correctly observes that the trial court found no prejudice.[1] The trial court found that the one witness defendant claimed had died during the delay was not listed as a witness and therefore is irrelevant. The trial court found that investigators had found "at least some" of the witnesses defendant contended could no longer be found. Defendant contends that several witnesses, Lard in particular, agreed to plea deals entailing testimony or evidence against him, allegedly at least in part because of the seriously oppressive pretrial incarceration situation they faced. Apparently, the incarceration situation was indeed unusual; however, incarceration necessarily entails some prejudice to one's person, and that kind of personal prejudice is of relatively minimal weight. *Collins*, 388 Mich at 694-695. The loss of a witness is far more serious prejudice, but here, defendant was able to cross-examine the witnesses against him regarding their possible motives to lie.

We note that the circumstances under which a defendant's right to a speedy trial has been found to have been violated usually involve extreme periods of unexplained delay, or discernible prejudice to the defense. See, e.g., *People v Levandowski*, 237 Mich App 612; 603 NW2d 831 (1999) (reversing sentence because a 5-year delay in implementing the sentence violated defendant's due process rights); *People v Davis*, 123 Mich App 553; 332 NW2d 606 (1983) (remanding for evidentiary hearing to disclose reasons for 31-month unexplained delay in prosecution); *People v Nuss*, 75 Mich App 346; 254 NW2d 883 (1977) (reversing because of an 8-year delay between date of offense and date of trial, loss of witness through memory lapse and loss of witness through death); *People v Fiori*, 53 Mich App 389, 220 NW2d 70 (1974) (43-month delay between defendant's photo identification by robbery victim and initiation of proceedings, loss of witness by death, loss of witness by memory lapse, and impaired ability to cross-examine witness due to loss of police officer's original notes). We do not believe the delay here can be said to be totally harmless. However, compared to the situations generally regarded as sufficiently prejudicial to trigger the extreme remedy of dismissal with prejudice, we are not definitely and firmly convinced that the trial court made a mistake.

It is manifestly obvious that defendant's trial should have proceeded more expeditiously. However, we are unable to conclude that defendant suffered the kind of prejudice sufficient to constitute a violation of his constitutional right to a speedy trial.

Defendant next argues that his conviction was based in part on Yancy's perjurious testimony that the $4,500 he received from the federal government had nothing to do with the case against defendant. A defendant's due process rights are violated if a conviction is based on the knowing use of perjured testimony, and prosecutors are obligated to correct any such perjury. *People v Gratsch*, 299 Mich App 640, 619-620; 831 NW2d 462 (2013). However, a defendant is

[1] The trial court incorrectly determined that defendant was obligated to show prejudice because the amount of delay attributable to the prosecution was less than 18 months. However, the trial court seemingly inquired into the possibility of prejudice independent of that conclusion. We are therefore not persuaded that the trial court's factual findings were tainted by its misapprehension of the applicable law.

only entitled to a new trial if any such misconduct actually affected the fairness of the trial. *Id*. We conclude that although the evidence is not entirely clear, it does appear that Yancy's testimony was intentionally or negligently false, and the prosecutor knew or should have known as much to at least some extent. However, we do not find that the fairness of defendant's trial was undermined.

At a motion hearing, FBI Agent Dan Harris testified the FBI had paid Yancy "for information against Pierson Hood members and their involvement, also for the Larry Pass homicide which was information against Mr. Lard and Mr. Smith." On direct, cross, and redirect examination, Yancy repeatedly admitted that he was paid for cooperating with law enforcement but repeatedly denied that any of the payment pertained to the instant case. We do not believe this[2] is merely conflicting testimony, because the prosecutor was aware of Harris's former testimony and did not exercise the opportunity to clarify that although defendant was not paid for his testimony per se, he did receive payment for information pertaining to the case. The distinction between payment for his cooperation versus his testimony may be subtle, but the result of Yancy's testimony was the impression that he received no payment of any kind arising out of the instant case, and the prosecutor failed to correct that misapprehension. We are uncertain that this was truly perjury, as opposed to a misunderstanding, but it was nevertheless uncorrected false testimony.

Nonetheless, it was readily apparent, and the prosecutor even repeatedly acknowledged, that Yancy had credibility problems. Yancy's testimony did *not* obscure the fact that he was a paid snitch. The prosecutor's opening statement and Yancy's own testimony established that he was a regular drug user who had purchased drugs from the victim several times, including the night of the homicide. Yancy admitted leaving the victim's house after making his purchase, going to a friend's house to get high, and then returning to the victim's house, where he smoked marijuana and snorted more cocaine. He admitted taking the victim's supply of cocaine from the bathroom, as instructed by Lard, and then leaving the house with defendant and Lard while the victim lay motionless in the kitchen, "gurgling off his blood." He stated that after he, Lard, and defendant dropped off his van, he went with them to drop off the guns at another house, and then they all went to yet another house, where he and defendant did drugs together before defendant drove him back to pick up his van. The trial court described defense counsel's cross examination as effective and said that it presented the jury with "the full panoply of ways to find that Mr. Yancy was not a believable witness." Additionally, Sgt. Shawn Ellis, the officer in charge of the case, testified that Yancy was not paid "to testify on this particular case." Given the fairly dreadful state of Yancy's credibility on the record as it is, we are simply not persuaded that the prosecution's failure to correct Yancy's statement that he received no payment in connection with the case truly bolstered Yancy's credibility in any meaningful way. Consequently,

[2] There was some disagreement as to whether the amount was $4,000 or $4,500, but considering the two-year interval between the testimonies, we can conceive of numerous possible explanations for the discrepancy, none of them nefarious. Furthermore, we are not persuaded that this discrepancy could have had the slightest effect on the outcome of the trial, nor does the record disclose any indication that the prosecutor actually observed the payment slips.

irrespective of whether the prosecutor committed misconduct, defendant was not denied a fair trial.

Defendant next argues that the prosecutor committed misconduct by eliciting from Ellis an opinion that defendant killed the victim and then utilizing that opinion, as well as her own, in closing argument. Technically, because defendant timely objected, we conclude that this issue is truly whether the trial court abused its discretion by admitting Ellis's answer to the prosecutor's questions. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). However, a preliminary question of law upon, such as admissibility pursuant to statute or a rule of evidence, is reviewed de novo. *People v Katt*, 468 Mich 272, 287; 662 NW2d 12 (2003). A witness in a criminal trial may not "express an opinion on the defendant's guilt or innocence of the charged offense." *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). However, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704.

The questioning to which defendant objects came at the end of the prosecutor's redirect examination of Ellis after defense counsel had extensively questioned the investigation, consistent with his theory that one of the witnesses testifying for the prosecution had actually killed Pass. The following exchange occurred:

> Q: Okay. Sergeant, are you confident that you have the right person seated in this defendant's seat?
>
> MR. WHITESMAN (Defense counsel): I want to object. That's the ultimate issue for the jury. I object to that.
>
> THE COURT: The ultimate issue for the jury is to evaluate his testimony on whether he believes that they have the right person.
>
> MR. WHITESMAN: It calls for an improper opinion also.
>
> THE COURT: So, I'll overrule the objection. The jury can either accept his conclusion or reject it. That's what the jury is there for.
>
> Q (by the prosecutor): Sergeant, is there any question in your mind that Feronda Smith killed Larry Pass?
>
> A: No.

The trial court later clarified its opinion that the officer was permitted to vouch for the credibility of his investigation. We agree, but the credibility of the investigation was not the call of the questions. The soundness and integrity of the investigation would constitute factual issues ultimately to be decided by the trier of fact; a witness is not per se precluded from rendering an opinion thereon. MRE 704. However, the prosecutor directly inquired into Ellis's opinion on defendant's guilt or innocence of a charged offense. The first question might, in context, be considered an intrinsic part of an officer's explanation of his or her investigation and therefore permissible. *People v Moreno*, 112 Mich App 631, 634-636; 317 NW2d 201 (1981). However, the latter is clearly a direct and pure inquiry into Ellis's opinion as to defendant's guilt or innocence, which is not to be considered by the jury. See *People v Boske*, 221 Mich 129, 133-

134; 190 NW 656 (1922). The trial court abused its discretion by permitting the challenged testimony.

We nevertheless do not believe the challenged testimony actually affected the outcome of the proceedings. Interestingly, the jury acquitted defendant of all weapons charges, convicting him only of felony-murder and armed robbery under an aiding and abetting theory. Consequently, it strongly appears that the jury in fact rejected much of the people's argument, in particular that defendant personally shot and killed Larry Pass. In his Standard 4 brief, defendant argues that the jury was, but should not have been, instructed on aiding and abetting. The prosecution's theory was that defendant was the killer, but the record contains ample evidence to support a finding that defendant in fact aided and abetted the murder rather than personally performing it. It was defendant's idea to go to Pass's residence to buy drugs. At some point, the deal soured and Pass was shot. After Pass was shot, Lard pulled his gun out of his jacket so Yancy could see it. He told Yancy to get Pass's stash of cocaine from the bathroom, and when Yancy got the cocaine from the bathroom and gave it to Lard, he handed it to defendant. Defendant, Lard and Yancy then left Pass's house, hid Yancy's van for a while, and dropped off the guns. Lard pleaded guilty to manslaughter and unarmed robbery. This collection of facts could support a finding of aiding and abetting, and explain why the jury seemed to reject the state's theory, but find defendant guilty of felony-murder and armed robbery. In short, it appears that the jury did not actually believe Ellis. Consequently, we do not believe defendant was prejudiced.

Finally, defendant contends that the prosecution engaged in misconduct depriving him of a fair trial by conducting a live demonstration during rebuttal closing argument, where it could not be subjected to cross-examination. We disagree. The trial court repeatedly and explicitly instructed the jury that the demonstration was not evidence and that its verdict must be based on the evidence. Indeed, the prosecutor, prior to the demonstration, explained that the purpose was to explain how certain injuries likely occurred to Pass, although conceding that not all of them were explicable. We do not perceive any good reason why closing argument must be strictly verbal, only that it absolutely must be based on evidence actually introduced at trial. There is no indication in the record that the jury failed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Indeed, given the jury's rejection of all gun charges, it appears that the jury not only rejected the demonstration's portrayal of the shooting, but the very idea that defendant had a gun and used it to personally murder Pass. Consequently, even if the demonstration was erroneous, it did not prejudice defendant.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause
/s/ Michael J. Riordan